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THE BANK OF EAST ASIA LTD SINGAPORE BRANCH

v.

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AXIS INCORPORATION BHD

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[COMPANIES WINDING-UP NO: (MT-1) 28-1-2009]
4 JUNE 2009

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COMPANY LAW: *Winding-up - Validity - Petition predicated upon judgment obtained in foreign jurisdiction - Failure to register judgment in Malaysia - Whether winding-up proceeding defective - Whether petition premature and void - Companies Act 1965, s. 231 - Reciprocal*
D *Enforcement of Judgments Act 1958, s. 7*

COMPANY LAW: *Winding-up - Liquidation - Appointment of provisional liquidator - Power of court - Order must state nature and description of property to be taken possession of - Whether mandatory - Breach thereof - Whether fatal - Companies (Winding-Up) Rules 1972,*
E *ss. 7(2, 17(1), 35(2)*

The petitioner had obtained a judgment in default against the respondent in the High Court in Singapore ('foreign judgment'), but had not registered the judgment in Malaysia. The non-
F registration notwithstanding, the petitioner petitioned to wind up the respondent, and pending that, obtained an *ex parte* order appointing a provisional liquidator for the respondent. The respondent applied to set aside the *ex parte* order, and before the learned Judicial Commissioner herein questions arose as to: (i)
G whether there was defect on the face of the *ex parte* order, and in any case whether the petitioner's failure to serve the *ex parte* summons in chambers on the respondent had breached ss. 7(2) and 17(1) of the Companies (Winding-up) Rules 1972 ('1972 Rules'); and (ii) whether the failure to register the foreign judgment
H under s. 7 of the Reciprocal Enforcement of Judgments Act 1958 ('REJA') was fatal to the winding-up proceedings.

Held (setting aside *ex parte* order):

I **(1)** Section 231 of the Companies Act 1965 empowers a court to appoint a provisional liquidator at any time after presentation of a winding-up petition and an application in this regard may be made *ex parte*. (para 2)

(2) In order for a winding-up proceeding to be validly instituted, the foreign judgment must be registered in Malaysia pursuant to REJA. In this case the foreign judgment was not registered and accordingly no proceedings for the recovery of the judgment debt may be instituted in Malaysia. The petition is premature and void and the proceedings cannot be entertained for being in contravention of s. 7 of REJA. (para 2)

(3) Rule 35(2) of the 1972 Rules which requires the order appointing a provisional liquidator to state the nature and description of the property of which the provisional liquidator is ordered to take possession, is mandatory in nature. The *ex parte* order here did not comply with this requirement. The description is vague and too general as it encompasses practically all of the assets of the respondent. The order also did not itemize the assets of the respondent, particularly those which may be in jeopardy and did not state with any particulars the assets to be placed in the hands of the provisional liquidator. This failure is fatal and renders the *ex parte* order defective. (para 2)

Case(s) referred to:

Ameriasa Tours & Travel Sdn Bhd v. PJB Pacific Advisory Services Sdn Bhd [2004] 2 CLJ 586 HC ***(refd)***

Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd [2002] 3 CLJ 10 HC ***(refd)***

In re a Judgment Debtor [1939] 1 Ch 601 ***(refd)***

Intrakota Komposit Sdn Bhd v. Sogelease Advance (M) Sdn Bhd [2004] 8 CLJ 276 HC ***(refd)***

Pui Chiau Tien v. Foi Chaw Leong [2004] 5 CLJ 145 HC ***(refd)***

Re Cheah Theam Swee [1996] 2 SLR 76 ***(refd)***

Re Lim Szu Ang, ex p Kewangan Utama Bhd [2005] 7 CLJ 23 HC ***(refd)***

Re Raju Jayaraman Kerpaya, ex p Associated Asian Securities (Pte) Ltd [1999] 5 CLJ 23 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 231

Companies (Winding-Up) Rules 1972, rr. 7(2), 17(1), 35(2)

Reciprocal Enforcement of Judgments Act 1958, s. 7

For the petitioner - Wong Rhen Yen (Leslie Looi with him); M/s Dennis Nik & Wong

For the respondent - Dr Wong Kim Fatt (Cheah SC with him); M/s Gulam & Wong

Reported by Wan Sharif Wan Ahmad

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JUDGMENT

Vernon Ong Lam Kiat JC:

[1] By a summons in chambers in encl. 17 the respondent Axis Incorporation Berhad ('Axis') applied to set aside the *ex parte* order appointing a provisional liquidator of Axis pending disposal of the petition. The *ex parte* order was granted on 19 February 2009 on the hearing of an *ex parte* summons in chambers filed by The Bank Of East Asia Limited Singapore Branch ('BEA'). Axis' application is founded on three principal grounds.

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(i) BEA's failure to serve the *ex parte* summons in chambers on Axis in breach of rr. 7(2) and 17(1) of the Companies (Winding-Up) Rules 1972 ('1972 Rules').

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(ii) Failure to register the foreign judgment.

(iii) Defects on the face of the *ex parte* order.

[2] After hearing of learned counsel for Axis and BEA respectively, the court made the following findings:

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(i) Section 231 of the Companies Act 1965 empowers a court to appoint a provisional liquidator at any time after presentation of a winding-up petition. An application in this regard may be made *ex parte* (see *Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd* [2002] 3 CLJ 10). The contention of learned counsel for Axis is without merit.

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(ii) The petition is founded upon a judgment in default dated 21 November 2008 obtained in the High Court in the Republic of Singapore (see para. 6 of petition). The judgment in question is a foreign judgment. As the petition is made upon a demand for a judgment debt (see s. 218 notice) the winding-up proceedings are made with the view of recovering the judgment debt. (see analogy with bankruptcy proceedings in *Re Lim Szu Ang, Exp Kewangan Utama Berhad* [2005] 7 CLJ 23 at 27-28; *Intrakota Komposit Sdn Bhd v Sogelease Advance (M) Sdn Bhd* [2004] 8 CLJ 276). In order for such proceedings to be validly instituted, the foreign judgment must be registered in Malaysia pursuant to s. 7 of the Reciprocal Enforcement of Judgments Act 1958 ('REJA'). In this case the foreign

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judgment was not registered. Accordingly, no proceedings for the recovery of the judgment debt may be instituted in Malaysia. The petition is therefore premature and void and the proceedings cannot be entertained for being in contravention of s. 7 of the REJA (see *Re Raju Jayaraman Kerpaya Ex P Associated Asian Securities (Pte) Ltd* [1999] 5 CLJ 23 at 29-30; *Re Cheah Theam Swee* [1996] 2 SLR 76 at 83; *In re a Judgment Debtor* [1939] 1 Ch 601 at 607-608).

(iii) Rule 35(2) of the 1972 Rules states that an order appointing a provisional liquidator shall state the nature and give a short description of the property of which the provisional liquidator is ordered to take possession. This is a mandatory provision so that non-compliance thereof renders the order defective (see *Pui Chiau Tien v. Foi Chaw Leong* [2004] 5 CLJ 145). The *ex parte* order failed to state with sufficient particulars the nature and description of the property of which the provisional liquidator is ordered to take possession. In this case the description is vague and too general as it encompasses practically all of the assets of Axis. The particulars of the assets of Axis could have been easily procured from Axis' annual report but this was not done. The *ex parte* order did not state or itemise the assets of Axis, particularly those which may be in jeopardy. It further did not state with any particulars the assets to be placed in the hands of the provisional liquidator. Instead, there is a general description in the nature of 'all property' as set out in para 1.2 of the *ex parte* order. Clearly this is not sufficient. In the circumstances the failure to particularise the assets is fatal and renders the *ex parte* order defective (see *Ameriasa Tours & Travel Sdn Bhd v. PJB Pacific Advisory Services Sdn Bhd* [2004] 2 CLJ 586).

[3] For the foregoing reasons the court granted an order in terms of Axis' application in prayers (a), (b), (c) and (d) with costs to be taxed unless otherwise agreed.